No. 91-8685

In The

Supreme Court of the United States

October Term, 1992

TERRY LYNN STINSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under U.S.S.G. Section 4B1.1, see U.S.S.G. Section 4B1.2 comment. (n.2), constitutes an "incorrect application of the sentencing guidelines" under 18 U.S.C. Section 3742(f)(1).

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The opinion of the Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reported at 957 F.2d 813 (J.A. p. 97a), and the opinion of the Court of Appeals for the Eleventh Circuit affirming petitioner's sentence is reported at 943 F.2d 1268 (J.A. p. 85a)

JURISDICTION

The petitoner, **TERRY LYNN STINSON**, was prosecuted by indictment in the United States District Court, for the Middle District of Florida, for violation of Title 18 U.S.C. §2113(a) and (d), Title 18 U.S.C. §922(g), §924(a)(2) and §924(e), Title 18 U.S.C. §924(c), Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2312 (J.A. p. 4a). Stinson pled guilty to all charges (J.A. p. 9a) and was sentenced on July 6, 1990 (J.A. pp. 14a).

Stinson appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under Title 18 U.S.C. §3742(a)(2) and (3) as well as Title 28 U.S.C. §1291 (J.A. p. 2a). Stinson's sentence was affirmed by the Eleventh Circuit Court of Appeals in an opinion rendered on October 4, 1991. Stinson's petition for rehearing was denied in an opinion entered on March 20, 1992. The petition for writ of certiorari was filed on June 18, 1992 and was granted on November 9, 1992 (J.A. p. 103a). The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under Title 28 U.S.C. §1254(1).

SENTENCING GUIDELINE PROVISIONS INVOLVED

U.S.S.G. §§2K2.1, 4B1.1, 4B1.2, 4B1.2 comment. (n.1), 4B1.2 comment. (n.2), and 4B1.4

STATEMENT

On October 31, 1989, at approximately 12:00 p.m., the Petitioner, Terry Lynn Stinson, entered Sun Bank located at 344 Monument Road, Jacksonville, Florida and approached one of the customer service employees. He demanded money from the bank employee and stated that if she did not comply he would throw what appeared to be a hand grenade in her lap. The customer service employee then escorted him to one of the teller windows where she instructed the teller to give him the money. The teller took the money out of the cash drawer and placed it on the counter. Mr. Stinson then handed the employee a plastic bag and told her to put the money in it. During the confrontation, Mr. Stinson displayed a sawed-off shotgun and also pointed it at the customer service representative's face.

Mr. Stinson stated to the employees that he did not want any dye packs or bait money and also stated that he wanted the money from the drive through cash drawers. A dye pack was placed in Mr. Stinson's bag, but it failed to activate.

After obtaining the money, Mr. Stinson ordered everyone in the bank to lie down. As he was leaving the bank, he threw the hand grenade that he had in his hand onto the floor. He fled the bank, traveling in a white

Chevrolet pick-up truck. A total of $9,427.00 in United States currency was taken in the robbery.

Subsequent investigation determined that the hand grenade used by Mr. Stinson was not armed. During the robbery, Mr. Stinson had in his possession a portable, hand held police scanner. Mr. Stinson's get-away vehicle was located by the police at 355 Monument Road in the Regency Lake Apartment Complex. Located in the back of the truck was an explosive device, constructed from PVC pipe, concrete, stereo speaker wires and other components. The area was evacuated and the Navy Explosive Ordinance Demolition Team was called to the scene and subsequently rendered the device harmless. The sawed-off section of the barrel of the shotgun used by Mr. Stinson in the bank robbery was also found in the back of the truck.

Subsequent to the bank robbery, it was reported to the Jacksonville Sheriff's Office that Mr. Stinson had accompanied a car salesman for Mike Davidson Ford on a test drive of a 1985 Ford van. During the test drive, Mr. Stinson took the car salesman, by gun point, to Woodcreek Apartments, 401 Monument Road, where Mr. Stinson resided. While in the apartment, Mr. Stinson restrained the car salesman with a pair of handcuffs and rope. Additionally, he told the salesman, Mr. Dorminey, that he had rigged a bomb in the apartment, which would go off if Mr. Dorminey left the closet where he was confined. Mr. Stinson then left his apartment driving the white pick-up truck and proceeded to Sun Bank where the robbery was committed. After the robbery, the defendant then returned for the Ford van, leaving the pick-up truck behind.

It was later reported by the car salesman that Mr. Stinson displayed a Florida identification at the car dealership, which reflected his true identity.

After the robbery, Mr. Stinson left Jacksonville, Florida traveling in the stolen Ford van. He traveled to Walt Disney World, in Orlando, Florida for a brief vacation on the day of the robbery. The following day, he traveled to Gulfport, Mississippi, where he was arrested on November 3, 1989. The Chevrolet pick-up truck which was used during the bank robbery was stolen from Cox Pools, Tallahassee, Florida, Mr. Stinson's former employer. The vehicle was reported stolen on October 6, 1989.

On January 10, 1990, a five count indictment was filed by a Middle District of Florida Grand Jury charging Terry Lynn Stinson, the Petitioner herein, with armed bank robbery, various firearm violations, including possession of a firearm by a felon (subject to the armed career criminal provision), and interstate transportation of a stolen motor vehicle. Count One charged Mr. Stinson with bank robbery on October 31, 1989, at Jacksonville, Florida, in violation of Title 18 U.S.C. §2113(a) and (d). Count Two charged that on October 31, 1989, having been previously convicted of a felony offense, Mr. Stinson possessed a firearm, in violation of Title 18 U.S.C. §922(g), §924(a)(2), and §924(e) (Armed Career Criminal Act). Count Three charged that on October 31, 1989, Mr. Stinson did knowingly use and carry a sawed-off shotgun during, and in relation to, a crime of violence, that is, bank robbery, in violation of Title 18 U.S.C. §924(c). Count Four charged that on October 31, 1989, Mr. Stinson possessed a sawed-off shotgun which was not registered to him in the National Firearms Registration and Transfer

Record, in violation of Title 26 U.S.C. §5861(d) and §5871. Count Five charged that on or about October 31, 1989, to on or about November 3, 1989, Mr. Stinson transported in interstate commerce, a stolen 1985 Ford van from Jacksonville, Florida, to Gulfport, Mississippi, in violation of Title 18 U.S.C. §2312. The Federal Public Defender for the Middle District of Florida was appointed to represent Mr. Stinson on January 29, 1990 and William Mallory Kent, Assistant Federal Public Defender filed an appearance on behalf of Mr. Stinson.

On April 11, 1990, Mr. Stinson entered a plea of guilty to Counts One through Five.

The Pre-Sentence Investigation Report determined that Mr. Stinson was a career offender pursuant to Sentencing Guidelines §4B1.1, choosing among his five counts of conviction as the "instant offense conviction" the charge of possession of a firearm by a convicted felon, the penalty for which was enhanced under the armed career criminal provisions of Title 18 U.S.C. §924(e) to life in prison, concluding that the charge of possession of a firearm by a felon was a crime of violence. Based on the career offender provision, with the predicate offense having a maximum penalty of life in prison, the base offense level was 37 and criminal history category was VI, with a guideline range of 360 months to life in prison.[1]

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[1] The description of the offense conduct and statement of facts up to this point has been taken from the Presentence Investigation Report, which is under seal in the district court record.

At the sentencing hearing, counsel for Mr. Stinson repeated the objection previously made to the United States Probation Office that possession of a firearm by a felon, if the offense was committed prior to November 1, 1989, was not a "crime of violence" under Guideline Section 4B1.1 [which defines the term by incorporating the definition of "crime of violence" under Title 18, U.S.C. §16], and could not be the predicate offense to trigger the career offender provisions of Guideline Section 4B1.1. (J.A. pp. 35a-38a)

The District Court ruled against Mr. Stinson as to his objection. The District Court then determined the base offense level to be 37, reduced that level two levels for "acceptance of responsibility" for a total offense level of 35, category VI, and a sentencing range of 292-365 months. The District Court sentenced Mr. Stinson to 365 months, plus a minimum mandatory consecutive five (5) years for use of a firearm during the commission of a crime of violence (Title 18 U.S.C. §924(c)). (J.A. pp. 44a-50a) That sentence was affirmed by the Eleventh Circuit on October 4, 1991.

Subsequent to the issuance of the first Stinson opinion on October 4, 1991, the United States Sentencing Commission issued an amendment to the Commentary to Sentencing Guideline §4B1.2, specifically addressing the issue in this brief. That amendment, which became effective on November 1, 1991, clarified the intent of the Sentencing Commission that the term "crime of violence" (as used in the career offender provision §4B1.1) does not include the offense of unlawful possession of a firearm by a felon. This clarifying amendment was the basis for a petition for rehearing and rehearing *en banc*. The Eleventh

Circuit denied the petition for rehearing in an opinion issued on March 20, 1992. Thereafter, the petition for rehearing *en banc* was denied, and the petition to this Court followed.

SUMMARY OF THE ARGUMENT

The teaching of *Williams v. United States*, 112 S.Ct. 1112 (1992), is that an error in interpreting a policy statement that prohibits a district court from taking a specified action could lead to an incorrect determination of the appropriateness of a departure. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the meaning of 18 U.S.C. §3742(f)(1). Commentary can rightly be said to have the same legal significance as policy statements. Therefore, the failure to follow the specific direction of U.S.S.G. §4B1.2 comment. (n.2), that the offense of possession of a firearm by a felon is not a "crime of violence" under U.S.S.G. §§4B1.1 and 4B1.2, when that failure results in the application of a guideline that should not be applied, causes a misapplication of the guidelines under 18 U.S.C. §3742(f)(1).

An analysis of the structure of the related guidelines, §§2K2.1, 4B1.1, 4B1.2 and 4B1.4, reveals that a failure to follow the specific direction of U.S.S.G. §4B1.2 comment. (n.2), renders §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 nugatory. That is, to treat a "felon-in-possession" offense as a crime of violence punishable as a career offender under 4B1.1, results in the other sections never being applied.

For example, §4B1.4 was adopted to apply only to armed career criminals under 18 U.S.C. §924(e).[2] Armed career criminals are "felons-in-possession" with three prior crimes of violence. A career offender is an offender whose current crime is a "crime of violence," and who has two prior crimes of violence. If being a "felon-in-possession" qualifies as a "crime of violence," then every armed career criminal will also be a career offender. Because the guidelines require the higher of the two applicable guidelines to control, armed career criminals would never be sentenced under the guideline created especially and solely for them, but would always be sentenced under the higher career offender guideline. Such an interpretation of the definition of "crime of violence" renders the Congressionally approved guideline §4B1.4 invalid. By generally accepted rules of statutory construction such an interpretation must be wrong.

Sentencing Commission commentary is analogous to administrative agency rules, which must be deferred to by the courts so long as they are not plainly inconsistent with the Congressional grant of authority. In this case, only by following the direction of the commentary, can the broader guideline framework of interrelated guidelines be given practical effect. Therefore, the court must defer to this commentary, and to fail to do so results in a misapplication of the guidelines.

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[2] Stinson's instant offense count used for enhancement under §4B1.1 was a §924(e) count.

ARGUMENT

I. Background

Section 4B1.1 of the Sentencing Guidelines provides:

> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Stinson did not contest element (1), that he was over eighteen at the time of the offense, or (3), that he had been twice convicted of crimes of violence. Stinson argued below that the offense used in his case as the predicate "instant offense of conviction," was not a "crime of violence," according to both (1) the commentary interpreting and guiding the application of U.S.S.G. §4B1.2, and (2) the guideline itself.

Stinson's conviction for possession of a firearm by a felon was chosen by the sentencing court as the predicate instant offense, holding over Stinson's objection, that possession of a firearm by a felon is a "crime of violence," as that term is defined in section 4B1.2 of the Sentencing Guidelines.[3]

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[3] Because Stinson had *three* prior violent felonies, he was subject to a minimum mandatory fifteen years to life imprisonment for conviction on the possession of a firearm charge, under Title 18, §924(e) (Armed Career Criminal Act). Stinson agreed that he was a career offender, but only by using his armed bank robbery conviction (Title 18, §2113(a) and (d)) as the predicate

Stinson's crime occurred on October 31, 1989, and he was sentenced on July 6, 1990. At the time of his offense §4B1.2 defined "crime of violence" to have the same meaning as the definition of crime of violence in Title 18, §16.

However, §4B1.2 was amended effective November 1, 1989, i.e., before Stinson's July 6, 1990 sentencing, to define crime of violence as follows:

> "(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*"[4] (emphasis supplied)

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instant offense. The maximum penalty for armed bank robbery is twenty-five years. Under the career offender provision of the guidelines, the maximum penalty for the predicate instant offense determines the total offense level. The total offense level is thirty-seven for a life offense, but only thirty-four for an offense punishable by twenty-five years.

[4] The definition applicable at the time of the offense (October 31, 1989) was that found at Title 18, §16, which reads:

§16. Crime of violence defined

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

The amended definition was apparently borrowed from the definition of crime of violence used in the Armed Career Criminal Act, Title 18, §924(e). Effective November 1, 1990, new Guideline §4B1.4 was added to expressly cover violations of the Armed Career Criminal Act, making an armed career criminal (a felon in possession with three prior crimes of violence or serious drug offenses), level 34 (or, in some cases, level 33, and a criminal history category of from IV to VI).

In the Application Notes in the Commentary to §4B1.2 effective November 1, *1989*, the Sentencing Commission stated that courts may look to "conduct set forth in the count of which the defendant was convicted," in deciding whether the predicate instant offense "presented a serious potential risk of physical injury to another." (U.S.S.G. §4B1.2, comment. (n.2)). A later amendment effective November 1, 1991, clarified what "conduct" was the focus of the inquiry, by adding "the conduct set forth (*i.e. expressly charged*) in the count of which the defendant was convicted."

Following the Eleventh Circuit's opinion in *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1992) (*Stinson I*), and without any advance public notice, the Sentencing Commission issued a *clarifying* amendment to Application Note 2 to the Commentary to the Career Offender

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(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

provisions. The note was amended by adding the following language:

> *"The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.* Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense . . . " (emphasis supplied).[5]

At the same time, but following public notice and submission to Congress, *guideline* §2K2.1 was substantially revised to expressly provide an offense level 24 (and, in some cases, level 26) for a felon in possession who had two prior crimes of violence or serious drug offenses (which, if the offense of "felon in possession" were a "crime of violence," would also fit exactly the career offender definition in §4B1.1, a point which will be discussed *infra*).

This amendment to the *guidelines* was effective November 1, 1991, but the *clarifying* amendment to the existing commentary presumably clarified preexisting

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[5] Post *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*"Stinson II"*) the United States Sentencing Commission submitted to Congress among its 1991 amendments to the Guidelines its previously published change in the commentary at issue here, United States Sentencing Commission, 57 Fed. Reg. 20148, May 11, 1992.

intent, that is, the intent at the time of Stinson's sentencing. And, indeed, the Sentencing Commission expressly made the amendment to U.S.S.G. §4B1.2 comment. (n.2) retroactive under §1B1.10 on August 26, 1992.

Based upon the clarification published by the Sentencing Commission that it did not intend a possession of a firearm offense to constitute a crime of violence for career offender purposes, Stinson petitioned for a rehearing and for rehearing *en banc*.

Stinson's petition for rehearing was denied in *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*Stinson II*), and his petition for rehearing *en banc* was subsequently denied by a memorandum order. In *Stinson II*, the Eleventh Circuit held that it was not bound by the change in U.S.S.G. §4B1.2's *commentary* until Congress amends *guideline* §4B1.2's language to exclude specifically possession of a firearm by a felon as a "crime of violence." For Stinson, this meant that the Eleventh Circuit stood by its original interpretation of §4B1.2 that possession of a firearm by a felon "inherently constitutes a crime of violence," and Stinson's sentence was affirmed and motion for rehearing denied.

The Eleventh Circuit did not discuss this Court's opinion in *Williams*, in declining to be bound by Sentencing Guidelines commentary expressly prohibiting the position it took in interpreting Sentencing Guideline Section 4B1.2.[6]

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[6] The *Williams* opinion was issued after Stinson's petition for rehearing was filed and after the United States filed its response, but before the court issued its opinion denying the

II. The "Williams" Analysis

In *Williams v. United States*, 112 S.Ct. 1112, 1119 (1992), Justice O'Connor, writing for a seven Justice majority, stated:

> "Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination . . . In that event, the resulting sentence would be one that was 'imposed as a result of an incorrect application of the sentencing guidelines' within the meaning of §3742(f)(1)."

That is, although there is a distinction between "guidelines" and "policy statements" interpreting the guidelines, and it is only an incorrect application of a "guideline" which triggers appellate review under §3742(f)(1), the interpretation of the guideline must be informed by a correct reading of any relevant policy statement.[7] An incorrect interpretation of a policy statement can lead to an incorrect interpretation of the affected guideline, and thus indirectly to a misapplication of the guideline and appellate review under §3742(f)(1).

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petition for rehearing in *Stinson II*. Counsel for Stinson cited *Williams* to the Eleventh Circuit as supplemental authority under Rule 28(j), of the Federal Rules of Appellate Procedure, under cover of a letter dated April 20, 1992, in support of the still outstanding petition for rehearing *en banc*.

[7] *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1732-1733, n.263 (1992).

Although this Court in *Williams* was addressing the significance of misinterpretations of *policy statements* and not *commentary*, commentary can rightly be said to have the same legal significance as policy statements, and hence principles of construction and application applicable to the one are equally applicable to the other. For example, and pertinent to the issue at hand, U.S.S.G. §1B1.7 ("Significance of Commentary") states:

> "The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. *Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. §3742.* Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement . . . "[8] (emphasis supplied)

In Stinson's case, U.S.S.G. §4B1.2, comment. (n.2) directs:

> *"The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.* Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions

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[8] The commentary to §1B1.7 elaborates: "Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. *These are to be construed as commentary and thus have the force of policy statements.*" (emphasis supplied)

Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. §924(e), §4B1.4 (Armed Career Criminal) will apply." (emphasis supplied)[9]

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[9] On December 31, 1992 the Sentencing Commission published for public comment a preliminary document containing proposed amendments for the 1993 cycle. Among the newly proposed amendments is amendment 61, which provides in pertinent part:

> "The Commentary to Section 4B1.2 is amended in Application Note 2 by deleting the words "does not include" in the first sentence of the second paragraph, and inserting in lieu thereof the word "includes."

The synopsis explains that the amendment is necessary to make it clear that "crime of violence":

> "includes the possession of a firearm by a felon, conduct which is a criminal offense because Congress has determined that such conduct presents a risk of violence."

In a novel introductory note to the entire set of proposed amendments, the Commission explained that:

> "The Commission agreed to publish, upon request of a single Commissioner, any proposal or issue for comment, including all proposals submitted from sources outside the Commission. *Therefore, publication of an amendment for comment does not necessarily indicate that the Commission or any individual Commissioner has formed a view on the merits of the proposed amendment.*" (emphasis added)

In light of the fact that the Commission voted three to one as recently as last August not only to ratify Application Note 2 as it was, but to make its application retroactive, it would not appear likely that the above proposed amendment represents the consensus of the Commission, and accordingly its adoption and submission to Congress appears unlikely.

Not only does the relevant commentary expressly define that possession of a firearm is not a "crime of violence," but it further directs that the applicable guideline will, in such cases, instead be either §2K2.1 or §4B1.4.

The Eleventh Circuit Court of Appeals first interpreted U.S.S.G. §4B1.2's term "crime of violence" before the Sentencing Commission issued the clarifying commentary now at issue.[10] However, following the issuance of the commentary, upon a petition for rehearing and petition for rehearing *en banc*, the Eleventh Circuit refused to reconsider its interpretation and follow this express commentary, holding that it would not be bound by commentary.[11] The opinion in *Stinson II* came out just

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[10] U.S.S.G. App. C (1991) described the changes in the commentary as *clarifying* changes:

> "This amendment clarifies that the application of §4B1.2 is determined by the offense of conviction (*i.e.*, the conduct charged in the count of which the defendant was convicted); *clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section . . .* " (emphasis supplied)

Ironically, the first opinion on Stinson from the Eleventh Circuit defining "crime of violence" relied upon the commentary notes then in effect to reach its holding. Judge Edmondson concluded the opinion stating:

> "Because defendant's instant conviction for weapons possession by a felon is a 'crime of violence,' *as defined in section 4B1.2 and its application notes,* the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines." (emphasis supplied)

[11] The opinion denying rehearing following the issuance of the commentary did not rest on any claimed lack of retroactivity. Under Eleventh Circuit precedent, clarifying commentary added after sentencing will be applied on appeal. *United States*

eleven days after the issuance of this Court's opinion in *Williams*. Neither party below had cited *Williams* before

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v. Gardiner, 955 F.2d 1492 (11th Cir. 1992). In any event, if that were an issue, it was resolved in Stinson's favor by the action of the Sentencing Commission on August 26, 1992 including the amendments to §4B1.2, comment. (n.l), among those given retroactive effect under §1B1.10. *See* 57 Fed. Reg. 42804.

There was language in the second Stinson opinion complaining that there had been no notice nor submission to Congress of the amended commentary. In direct response, the Sentencing Commission issued amendment 461 for submission to Congress in 1992. U.S.S.G. App. C (1992) explains amendment 461:

> "[T]his amendment ratifies a previous amendment to the commentary to §4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to §2K2.1. The previous amendment to the text of Application Note 2 clarified that application of §4B1.2 is governed by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, §4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. §924(e) and who used or possessed the firearm in connection with a crime of violence (§4B1.4(b)(3)(A)). This action to ratify a previous commentary amendment was taken because of concerns raised by *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress. **The effective date of this amendment is November 1, 1992."**

However, as a clarifying and conforming change in the commentary to §4B1.2, the 1991 amendment stating that felon-in-possession is not a crime of violence was not required to be submitted to Congress under 28 U.S.C. §994(p), which states that only amendments to the guidelines must be submitted to Congress. Yet, as an authoritative statement of Commission intent as to how the career offender guideline is to be interpreted and applied, failure to give effect to this amendment can be reversible error under 18 U.S.C. §3742(f)(1).

the issuance of *Stinson II*, although counsel for Stinson did submit *Williams* as supplemental authority the following month, before the petition for rehearing *en banc* was summarily denied. Had the Eleventh Circuit chosen to discuss *Williams*, what teaching would it have drawn? Perhaps we can approach the application of *Williams* to Stinson best by analyzing the *Williams'* dissent.

The dissent in *Williams* complained that the majority failed to define what the phrase "incorrect application of the guidelines" means. It is true, the majority opinion in *Williams* did not explain the interstitial analytical steps by which one concludes that the failure to abide by a specific prohibition in a policy statement leads to an incorrect determination of the guideline; the omission is understandable, perhaps, if one assumes that such a clearly inconsistent application of the policy statement to the guideline as occurred in *Williams* self-evidently results in a misapplication of the guideline itself. Similarly, in Stinson's case, the misinterpretation of the guideline resulting from the failure to follow the specific direction of the commentary is self-evident.

The dissent, arguably, did not object in principle to the proposition that a *particular* error in interpretation of a policy statement (read, "commentary") could result in a misinterpretation of a particular guideline, and hence a misapplication of that guideline. Justice White wrote, "an error in their [i.e., a policy statement's] interpretation is not, *in itself,* subject to appellate review . . . " *Williams,* at p. 1125 (emphasis added). By implication, if the error in interpretation can be shown to result in an error in interpreting the relevant guideline, review under §3742(f)(1) would come into play. Justice White proceeded to quote from the legislative history to support the dissent's position:

> "It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review, while *one that is consistent with guidelines but inconsistent with the policy statements is not.* This is not intended to undermine the value of the policy statements. It is, instead, a recognition that *the policy statements may be more general in nature than the guidelines and thus more difficult to use* in determining the right to appellate review." S.Rep. No.98-225, p. 167 (1983), U.S.Code Cong. & Admin.News 1984, pp. 3182, 3350 (separate emphasis added).

This is not to say that a sentence that is inconsistent with a commentary *and* inconsistent with the affected guideline is not reviewable. Instead, this explains that in principle policy statements (and commentary) will be more general than the specific guideline, and from an analytical point of view, a sentence could be inconsistent with the more general policy statement or commentary, and yet be consistent with the specific guideline; in such a case the perceived "error," i.e., inconsistency, in interpreting the policy statement is not reviewable. Perhaps there

would have been some merit to a narrow interpretation of the Eleventh Circuit's position had the newly issued commentary been less specific and more general.

The dissent in *Williams* then focused on the effect a misinterpretation of a policy statement would or would not have on an applicable guideline range. Finding that in the case of the misinterpretation of the policy statement in *Williams* there was no effect on the applicable guideline range, the dissent argued that Williams was not entitled to relief under §3742(f)(1).

But the rationale of the *Williams* dissent is not applicable to the commentary in Stinson's case. In Stinson's case, the commentary is more specific than the guideline. Unless the commentary is to be disregarded (as the Eleventh Circuit felt it could), there is no way to uphold the interpretation of U.S.S.G. §4B1.2 that possession of a firearm by a felon is a "crime of violence." Failure of the court to follow the commentary in Stinson's case resulted in the application of the guideline range mandated under U.S.S.G. §4B1.1 (Career Offender), which, for an offense with a statutory maximum penalty of life, is level 37, compared to a level 34, had the court followed the commentary, and applied the guideline range mandated under U.S.S.G. §4B1.4 (Armed Career Criminal). Thus, the failure of the court to apply the commentary in Stinson's case *did* affect the applicable guideline range – by three levels.[12]

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[12] Level 37, Category VI, has a range of 360 months to life; Level 34, Category VI, has a range of 262-327 months. However, Stinson received two levels off for acceptance of responsibility under §3E1.1, hence his Total Offense Level fell to Level 35. On

Thus as in *Williams*, by either the majority or dissent's rationale, we would submit that the court's failure to follow the commentary in Stinson's case, specifically directing that the offense of possession of a firearm by a felon is not a crime of violence, constitutes a "misapplication of the guidelines" under 18 U.S.C. §3742(f)(1).[13]

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remand, applying the principle of §1B1.11, Stinson would receive three levels off for acceptance of responsibility under the current version of §3E1.1, and have a Total Offense Level of 31, for a range of 188-235 months.

[13] The court also ignored or misapplied other relevant commentary within application note 2 to §4B1.2, which explained what "conduct" was the subject of examination in determining whether the offense "presents a serious potential risk of physical injury to another" [or, under the language of Title 18, U.S.C. §16, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"]. Both at the time of sentencing, and in a slightly modified version at the time of the opinion denying the petition for rehearing, application note 2 stated in pertinent part:

> "Other offenses are included where . . . (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another . . ."

It is, at least to Petitioner, self-evident that the offense of possession of a firearm by a felon, cannot be, *by its nature*, subject to the risk identified above. *See United States v. Bruce*, 965 F.2d 1000 (11th Cir. 1992) (per curiam), in which two members of the panel stated they would not have adopted the "per se" rule of *United States v. Stinson*.

III. The Structural Analysis[14]

The Eleventh Circuit, in focusing on the one sentence amendment to U.S.S.G. §4B1.2 comment. (n.2) in isolation, ignored the newly added cross-reference to the newly amended *guideline* §2K2.1, and also ignored the addition effective November 1, *1990* of new *guideline* §4B1.4 (Armed Career Criminal).

An armed career criminal is a defendant who violates 18 U.S.C. §922(g) [felon-in-possession] and has three prior convictions for either a crime of violence or a serious drug offense. Before November 1, 1990, and the addition of §4B1.4, there was no guideline for an armed career criminal and armed career criminals were sentenced outside the guidelines under the statutory mandate of a sentence of "not less than fifteen years." Title 18, §924(e). The 1989 guideline statutory index, U.S.S.G. App. A (1989), did not list an applicable guideline for 18 U.S.C. §924(e), whereas the current index in U.S.S.G. App. A (1992) directs the application of §2K2.1 or §4B1.4. In counsel's experience, armed career criminals were *not* sentenced under the career offender guideline,[15] although

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[14] For an excellent structural analysis of the guidelines as they relate to the determination whether "felon-in-possession" is a crime of violence for career offender purposes, see Mary E. McDowell, *Felon-In-Possession: Why It Is Not a "Crime of Violence" under the Career Offender Guideline*, Vol. 5, No. 2, Federal Sentencing Reporter 112 (Sept./Oct. 1992).

[15] *See e.g. United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991), whose opinion, that a felon-in-possession is not a career offender, the panel in *Stinson I* treated as dicta. *See* Toby D. Slawsky, *Career Offender Provisions – What Prior Offenses Count?*, 53 Federal Probation 63, 66 (December 1989).

if one assumes that possession of a firearm by a felon is a crime of violence, then by definition most armed career criminals would also be career offenders.[16]

Guideline §4B1.4 was expressly created for armed career criminals, effective November 1, 1990, establishing their offense level as level 34 (or, in some instances 33) unless either the career offender guideline or Chapter 2 guideline applicable to the conviction, is higher. Under the *Stinson II* court's rationale, however, the armed career criminal guideline would *never* be applied, because under *Stinson I* and *II*, all armed career criminals would also be career offenders (because their instant offense conviction for possession of a firearm will be treated as a crime of violence and automatically trigger the application of the career offender provision), and would invariably face substantially lengthier sentences as career offenders than as armed career criminals.[17] In other words, the Eleventh

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[16] Most, but not all, because (1) the Armed Career Crimina! Act ("ACCA") counts *juvenile* convictions, while the career offender guidelines do not, (2) the career offender provisions exclude convictions after a term of years, whereas the ACCA has no time limits on the use of prior convictions, and (3) the career offender provision excludes non-residential burglaries, whereas the ACCA does not.

[17] Level 37, Category VI based on §4B1.1's career offender offense level for offenses punishable by life – an armed career criminal is punishable by a minimum fifteen years to a maximum of life. Armed career criminals are three, and in some cases, four *levels* lower under §4B1.4, and can range from Category VI down to Category IV under §4B1.4. Thus the spread can be four levels and two categories, which can run from 360 months to life, for career offenders to 188-235 months for armed career criminals. In the case of certain technical exceptions

Circuit's holding in *Stinson I* and *II* renders Guideline §4B1.4 nugatory. Hence the Eleventh Circuit's rationale for its holding – that it was only overriding *commentary*, and a circuit court is not bound by commentary, as opposed to Congressionally mandated *guidelines* – does not withstand scrutiny.

Nor is it only the impact on guideline §4B1.4 at issue in *Stinson I* and *II*. When the Sentencing Commission responded to the series of pre-1991 amendment circuit opinions that possession of a firearm either categorically or on the facts of the case, was a crime of violence, by adding clarifying commentary to the contrary, it also amended (with Congressional approval) pre-existing guideline §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms) to increase the range from level 12 to 24 (and 26 in cases involving firearms listed in 26 U.S.C. §5845(a)) for felons-in-possession who had two prior crimes of violence or controlled substance offenses. Note: this definition corresponds exactly to that set by the Eleventh Circuit for a career offender! Thus under the *Stinson I* and *II* rationales, new guideline §§2K2.1(a)(1) and (2) *would never be applied* because in the Eleventh Circuit such defendants would *always* be career offenders and always subject to an enhanced punishment under §4B1.1 instead.

Thus, the Eleventh Circuit in *Stinson II* has, implicit in its holding, determined that sentencing guidelines §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 will never be

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noted in the preceding footnote, the §4B1.4 ACCA guideline would apply still.

applied.[18] Such a construction of §4B1.1 violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant. *Kungys v. United States*, 485 U.S. 778 (1988). Therefore, the error rests not only upon the failure to follow the specific direction in the commentary to the contrary, but also upon a misapprehension of the broader *guideline* framework. From this statutory construction analysis of the interplay of the related guidelines, it is clear that as to this particular case, and this particular commentary, in this particular context of interrelated guidelines and statutory offenses, that the failure to follow the specific direction in the commentary did in fact result in a misapplication of the guideline itself.

IV. Review of Case Law in the Circuits

Before the issuance of the amended commentary on November 1, 1991, relying on either the pre-November 1989 Title 18, §16 definition, or the later "borrowed" §924(e) definition of crime of violence in guideline §4B1.2, the Third, Seventh, Eighth, and Tenth Circuits held *on the facts of the respective cases* (impliedly, or expressly stating that the offense was not *per se* or categorically a crime of violence), that possession of a firearm by a felon was a crime of violence for career offender purposes. *United States v. Williams*, 892 F.2d 296 (3rd Cir. 1989); *United States v. McNeal*, 900 F.2d 119 (7th Cir. 1990); *United States v. Alvarez*, 914 F.2d 915 (7th Cir. 1990); *United*

[18] Except in the narrow circumstances noted above as to §4B1.4 only.

States v. Cornelius, 931 F.2d 490 (8th Cir. 1991); *United States v. Walker*, 930 F.2d 789 (10th Cir. 1991).[19] In addition, the Fifth, Ninth and Eleventh Circuits each held that possession of a firearm by a felon was *per se*, or categorically, a crime of violence. *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990); *United States v. Shano*, 947 F.2d 1263 (5th Cir. 1991) (*Shano I*); *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990); *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991) (*Stinson I*).[20]

Following the Eleventh Circuit's opinion in *Stinson I*, and without any advance public notice, the Sentencing Commission issued the *clarifying* amendment to Application Note 2 to the Commentary to the Career Offender provisions, which is the subject of this brief. The Eleventh Circuit refused to reconsider its opinion following a petition for rehearing which briefed the matter of the

[19] The Seventh Circuit, establishing that possession of a firearm is not categorically a crime of violence also held, in *United States v. Chappel*, 942 F.2d 439 (7th Cir. 1991), that possession was *not* a crime of violence on the facts presented in that case.

[20] There was a debate within these opinions as to whether only the generic offense, or the offense conduct charged in the indictment or the actual underlying conduct could be examined to determine whether a crime of violence had occurred. Arguably this is a sub-issue of the question at hand, but it is counsel's opinion that it is not necessary to reach that question to resolve this case.

The Circuits split on the effect of *Taylor v. United States*, 110 S.Ct. 2143 (1990) on this sub-issue.

clarifying amendment to the commentary in *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*Stinson II*).[21]

However, six other circuits that have been called upon to re-examine the issue since the November 1, 1991 clarifying amendment have held contrary to the Eleventh Circuit, that possession of a firearm by a felon is *not* a crime of violence. *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992); *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992); *United States v. Carter*, ___ F.2d ___, 1992 U.S. App. LEXIS 32517 (2nd Cir. 1992); *United States v. Joshua*, 976 F.2d 844, 850-856 (3rd Cir. 1992)[22]; *United States v. Samuels*, 970 F.2d 1312 (4th Cir. 1992); *United States v. Shano*, 955 F.2d 291 (5th Cir. 1992) (*Shano II*); and *United States v. Sahakian*, 965 F.2d 740 (9th Cir. 1992).[23]

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[21] On May 14, 1992, in *United States v. Adkins*, 961 F.2d 173 (11th Cir. 1992), the Eleventh Circuit reaffirmed *Stinson I* and *Stinson II*.

[22] *Joshua* held that on its facts, the charge did not sustain the application of the career offender provisions. *Joshua* turned on whether the court could look behind the conduct expressly charged in the indictment. Because *Joshua* decided that the amended commentary prohibiting a court from looking to the underlying conduct was not clearly inconsistent with the guideline, the court must give it effect, and based upon the language in the indictment in the particular case, the charge of possession of a firearm by a felon was not a crime of violence. *Joshua* rejected, however, the Commission's attempt in the commentary to prohibit the application of career offender status to possession of a firearm on a *per se* basis, holding that this interpretation could not reasonably be supported by the guideline itself.

[23] *But see, United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992), in which no issue was made of using a possession charge as a predicate for the career offender.

In *Sahakian*, the Ninth Circuit went from holding possession of a firearm is categorically a crime of violence (in *O'Neal*) to hold instead that it categorically is *not* a crime of violence. Similarly, the Fifth Circuit, post amendment in *Shano II* reversed its prior holding in *Shano I*.[24] The First Circuit, in *Bell* and *Doe*, has now joined with the new position of the Ninth Circuit in *Sahakian*, that possession of a firearm by a felon is categorically *never* a crime of violence. In the Second Circuit in *Carter*, the government conceded that the commentary mandated a reversal:

> "Effective November 1, 1992, a revision to §1B1.10(d) of the Sentencing Guidelines establishes retroactively that a "felon-in-possession" conviction under §922(g)(1) is never a "crime of violence" for purposes of §4B1.1, 57 Fed. Reg. 42804 (1992), thereby undercutting the government's position. After oral argument and upon learning of this revision, *the government informed this court that it does not oppose remand for resentencing in conformity with this Guidelines amendment*. Accordingly, we remand for resentencing." *Carter, supra*. (emphasis supplied)

The Eighth Circuit, in *United States v. Saffeels*, ___ F.2d ___, 1992 U.S. App. LEXIS 33236 (8th Cir. 1992), declined to reverse *Cornelius*, but noted that this Court had granted certiorari in this case [i.e., Stinson], and rather than overrule a prior panel would leave the ultimate disposition to this Court.[25]

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[24] This Court granted certiorari in *Kyle v. United States*, 112 S.Ct. 2959 (1992), and remanded *Kyle* for resentencing in light of *Shano II* and the amended commentary.

[25] The Sixth Circuit, *in an opinion not certified for publication*, reported as *United States v. Beckley*, 972 F.2d 349 (6th Cir. 1992),

Among all the opinions to date, the only useful analysis of the questions involved is found in *Joshua*. In declining to follow the lead of the Eleventh Circuit, the court in *Joshua* looked first at the role of the Sentencing Commission in the statutory scheme. In addition to promulgating the guidelines, the Commission has a continuing obligation to "review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." *Joshua* at p. 854, quoting 28 U.S.C. §994(o). As this Court stated in *Braxton v. United States*, 111 S.Ct. 1854 (1991), "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* 111 S.Ct. at 1858. *Joshua* concluded that it was clear that the Commission had a part to play when courts, interpreting the same language, reach contrary conclusions.

According to *Joshua*, unless the Commission adopts an interpretive commentary that the text of the guideline cannot reasonably support, the courts should follow the commentary. *Joshua* held that the amendment to the commentary which attempts to prohibit on a *per se* basis application of career offender status to the offense of "felon-in-possession," is not reasonably supported by the

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the unpublished opinion of which, however, can be found at 1992 U.S. App. LEXIS 17473, declined to apply the amendment *retroactively*. *Beckley* was decided on July 22, 1992, one month before the Sentencing Commission acted to make the amendment retroactive.

guideline, and would not be followed by the Third Circuit. On the other hand, the court found the resolution of the question whether courts are permitted to look to underlying conduct to determine whether there had been a crime of violence, which the amendment prohibits, to be an example of commentary clarifying an ambiguity, in which case, the Commission's interpretation must be followed.

The issue is misstated by the Eleventh Circuit, according to *Joshua*, when it frames the issue whether the Commission has the authority to overturn circuit court precedent. Obviously not, and yet the Commission is authorized to interpret the guidelines without going through Congress. 28 U.S.C. §994(p) (requiring that the Commission submit to Congress only amendments to the guidelines themselves). Thus the issue is analogous to that faced by courts in responding to an administrative agency's interpretation of an ambiguous statute. Normally, courts give deference to such interpretations. And the case is more compelling with the guidelines, because the Commission is the entity that initiates the guidelines in the first place. Thus, so long as the Commission's interpretation of a guideline is a permissible reading of the guideline, courts should defer to it, and if this means reconsidering a prior panel's decision, so be it.

Of course, a major criticism that can be made of *Joshua's* application of its reasoning to the issue at hand, is that in analyzing §4B1.1 in isolation, it completely failed to consider the interplay of guideline §§2K2.1, 4B1.1 and 4B1.4. An analysis of that interplay – a structural analysis – makes clear that the courts have been in

error in consistently applying §4B1.1 to felons-in-possession, and it is the courts, not the Sentencing Commission, which have interpreted the guideline in a way which cannot be supported by an analysis of the guideline in context. With this knowledge, but applying the reasoning of *Joshua*, we would argue that it is error for a court to fail to give deference to commentary that is clearly consistent with the overall framework and purpose of the relevant guidelines.

Where this leaves the issue in the circuits is that only the Eleventh and Eighth Circuits continue to hold, alone among all nine circuits that have considered the issue, in the face of Sentencing Commission commentary expressly and directly contradicting its position, that possession of a firearm by a felon is always and in every case, regardless of the conduct charged in the indictment or the actual underlying conduct, a crime of violence for purposes of the Career Offender provision.

CONCLUSION

Based on the analysis of *Williams* and a structural analysis of the interrelated guidelines, Petitioner Stinson submits that the court's failure to follow the specific direction of the commentary that possession of a firearm by a felon was not a crime of violence, resulted in a misapplication of the guidelines under 18 U.S.C. §3742(f)(1).

WHEREFORE, Petitioner, *TERRY LYNN STINSON*, respectfully prays this Honorable Court vacate his sentence and remand the case for resentencing with instructions that he be resentenced as an armed career criminal under U.S.S.G. §4B1.4.

Respectfully submitted,

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APPENDIX

2. FIREARMS

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.

(a) Base Offense Level (Apply the Greatest):

(1) **26,** if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(2) **24,** if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or

(3) **22,** if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(4) **20,** if the defendant –

(A) had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) is a prohibited person, and the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(5) **18,** if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(6) **14,** if the defendant is a prohibited person; or

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), or (m).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-4	add **1**
(B)	5-7	add **2**
(C)	8-12	add **3**
(D)	13-24	add **4**
(E)	25-49	add **5**
(F)	50 or more	add **6**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved a destructive device, increase by **2** levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by **2** levels.

Provided, that the cumulative offense level determined above shall not exceed level **29**.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm of ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply –

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: *18 U.S.C. §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).*

Application Notes:

1. *"Firearm" includes (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).*

2. *"Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellent powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).*

3. *"Firearm listed in 26 U.S.C. § 5845(a)" includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any "other weapon," as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.*

4. *"Destructive device" is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas – (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting*

any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).

5. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under § 4A1.1 (Criminal History Category).*

6. *"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; or (v) being an alien, is illegally or unlawfully in the United States.*

7. *"Felony offense," as used in subsection (b)(5), means any offense punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*

8. *Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.*

9. *For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.*

10. *Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) – (a)(5), subsection (b)(2) is not applicable.*

11. *A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.*

12. *If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because of base offense level itself takes such conduct into account.*

13. *Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale*

of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

14. *Under subsection (c)(1), the offense level for the underlying offense is to be determined under § 2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*

15. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

16. *An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly exceeded fifty; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

17. *A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See § 4B1.4.*

18. *As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 189); November 1, 1990 (*see* Appendix C, amendment 333); November 1, 1991 (*see* Appendix C, amendment 374); November 1, 1992 (*see* Appendix C, amendment 471).

* * *

§4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17

(G) More than 1 year, but less than 5 years	12.

* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. *"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.*

2. *"Offense Statutory Maximum" refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.*

Background: 28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517.18 (statement of Senator Kennedy).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendments

47 and 48); November 1, 1989 (*see* Appendix C, amendments 266 and 267); November 1, 1992 (*see* Appendix C, amendment 459).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –

(i) has an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that present a serious potential risk of physical injury to another.

(2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one

felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. *The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring and attempting to commit such offenses.*

2. *"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (ie., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.*

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an

increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*

4. *The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 49); November 1, 1989 (*see* Appendix C, amendment 268); November 1, 1991 (*see* Appendix C, amendment 433); November 1, 1992 (*see* Appendix C, amendment 461).

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§4B1.4. Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

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* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

Commentary

Application Note:

1. *This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. The terms "violent felony" and "serious drug offense" are defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definitions of "violent felony" and "serious drug offense" in 18 U.S.C. § 924(e)(2) are not identical to the definitions of "crime of violence" and " controlled substance offense" used in §4B1.1 (Career Offender), nor are the time periods for the counting of prior sentences under §4A1.2 (Definitions and Instructions for Computing Criminal History) applicable to the determination of whether a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).*

   It is also to be noted that the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute and may vary to some extent from jurisdiction to jurisdiction.

Background: *This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category many not adequately*

reflect the defendant's criminal history; see §4A1.3 (Adequacy of Criminal History Category).

Historical Note: Effective November 1, 1990 (*see* Appendix C, amendment 355). Amended effective November 1, 1992 (*see* Appendix C, amendment 459).